No. 22305

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

C & C PLYWOOD CORPORATION AND VENEERS, INC., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF RESPONDENTS
C & C Plywood Corporation and Veneers, Inc.

GEORGE J. TICHY,
Attorney for Respondents

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JURISDICTION

This matter is before this Court on the petition of the National Labor Relations Board for the enforcement of its Order against the Respondent Employers, C & C Plywood Corporation and Veneers, Inc.

issued on April 13, 1967. (R. 60-61)[1] The Board's Decision and Order is reported at 163 NLRB No. 136. In their Answer, the Respondent Employers have denied the commission of any unfair labor practices, and have requested that this Court deny enforcement of the Board's Order and dismiss these proceedings. (R. 62-65) The Respondents believe that this Court has jurisdiction of this matter under Section 10(e) of the National Labor Relations Act, as amended. (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.)

STATEMENT OF THE CASE

I. Introduction to the Bargaining Relationship.

A representation election was conducted by the National Labor Relations Board on July 6, 1962, in which Plywood, Lumber & Sawmill Workers Local Union No. 2405, herein called the Union, was the petitioning union, and C & C Plywood Corporation and Veneers, Inc. were the Employers. On August 28, 1962, the Board, through its Regional Director, certified the Union as bargaining agent. (Tr. 25, Jt. Ex. 1)

Bargaining followed in a series of meetings between the parties and was consummated in a collective bargaining agreement on April 19,

[1] For the convenience of the Court, the same abbreviations have been employed in this Brief as in the Board's Brief. Thus, "R." refers to Vol. I of the Transcript of Record followed by the handwritten page number appearing at the bottom center of the page involved. "Tr." refers to Vol. II of the Transcript of Record (Reporter's Transcript) followed by the handwritten page number appearing in the upper right hand corner of the cited page. Jointly introduced exhibits are designated "Jt. Ex." followed by the Exhibit number. "G.C.Ex." denotes a General Counsel's Exhibit followed by the number of the Exhibit.

1963. The agreement was then reduced to writing and was executed by the parties on May 1, 1963. (Tr. 26-27, Jt. Ex. 3)

II. The Facts upon which the Premium Pay Unfair Labor Practice was Based.

On May 20, 1963, C & C Plywood Corporation, one of the Respondent Employers here, announced a premium pay plan for those of its employees employed as members of its glue spreader crews. The Union objected to the plan and in two successive grievance meetings sought to have the Company rescind it. The Company refused, contending that the plan was initiated properly under the provisions of Article XVII, Section A of the labor agreement between the parties. (Tr. 27) The pertinent portion of that Section of the Agreement upon which C & C relied provides:

> "A. A classified wage scale has been agreed upon by the Employer and the Union, and has been signed by the parties and thereby made a part of the written Agreement. The Employer reserves the right to pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude or the like.* * *" (Jt. Ex. 3, p. 10)

The Union was unsuccessful in its efforts to get the Company to rescind the premium pay plan. The Union was totally uninterested in discussing the basis for or conceivable revisions in the plan. Instead, on July 31, 1963 the Union filed unfair labor practice charges against C & C Plywood Corporation.[2]

III. The Premium Pay Unfair Labor Practice Proceedings.

After hearings were held, a Trial Examiner of the Board

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[2] Case No. 19-CA-2686. Veneers, Inc. was not named in that case and was not a party to it. This is not the alleged unfair labor practice upon which this case before this Court is based. It is an antecedent unfair labor practice charged only against C & C Plywood and is material to a consideration of this case.

rendered his Decision in which he found that no unfair labor practices had been committed and recommended that the Complaint be dismissed in its entirety. The Union, and General Counsel of the Board, filed exceptions to the Decision and appealed the matter to the Board. The Board, in a split decision, reversed the Trial Examiner and found that C & C Plywood Corporation could not rely on the language of the labor contract and thus had violated the Act by effectuating the premium pay plan without first bargaining the specific plan with the Union. (148 NLRB 414, 1964) C & C Plywood Corporation deemed the decision to be in error and promptly advised the Board that it would not comply and urged that the matter be presented to this Court. This was done. This Court, in a considered decision, refused to enforce the Order of the Board (351 F.2d 224, September 10, 1965) The Board then sought certiorari to the United States Supreme Court. This was granted. (384 U.S. 903) Thereafter, upon due proceedings being held, that Court, relying upon the absence of an arbitration clause, a condition voluntarily preferred by the parties, set aside the language of the contract as playing no part in the Company's original decision to establish the premium pay plan and reversed this Court, ordering the enforcement of the Board's Order herein. (385 U.S. 421, January 9, 1967)

IV. Employees Advise of Union's Loss of Majority Status.

Meanwhile, after July 15, 1963, many employees within the bargaining unit came to the management of Respondent Employers' and advised the Employers that they, the employees, no longer wished to be represented by this Union and that it was their opinion that a majority of the employees in the bargaining unit no longer

wished to be represented by this Union. (Tr. 28-29) As a consequence of these developments, which were substantiated by other factors, the Respondent Employers believed in good faith that the majority status of the Union no longer continued in the appropriate bargaining unit.[3]

V. The Employers Seek Resolution of Union Status.

The Employers, however, were not at liberty to immediately refuse to bargain further with the Union because of the restrictions placed upon taking any action under these circumstances by the National Labor Relations Board.[4] Thus, the Employers were re-

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[3] Substantiating factors include the large number of employees within the bargaining unit openly opposed to the Union continuing as bargaining agent; a significant increase in crew size from 145 (134 of whom were eligible to vote) at the time of the representation election (July 26, 1962) to 201 as of September 3, 1963, immediately following the Employers' first request for a representation election; the turnover that had occurred within the crew by which only 78 of the original 145, or less than 54% of the original crew, remained in the employ of the Employers, and only 68, or less than 47%, of the original crew that voted in the July, 1962 representation election were employed on September 3, 1963. (Tr. 29-30) The Union also verified its lack of support by employees within the bargaining unit in the exchange of correspondence between the Employers and the Union in March, 1964 (Jt. Ex. 18 and 19)

[4] The Board has held that neither party to an existing labor agreement may seek a representation election during the sixty day period immediately prior to the expiration of that contract, which is known as the insulated period. Instead, the Board has ruled that such an election must be sought either in the thirty day period prior to the aforesaid insulated period or after the expiration of the contract. Deluxe Metal Furniture Co., 121 NLRB 995 (1958) as modified by Leonard Wholesale Meats, 136 NLRB 1000 (1962). In addition, the Board will consider a continuing contract to be a bar to a representation proceedings so it is necessary that one or both of the parties to the labor contract serve notice upon the other opening the contract for changes or terminating it. General Cable Corporation, 139 NLRB 1123 (1962) Finally, the third applicable Board rule is stated in Purity Baking Company, 124 NLRB 159, 162 n. 10 (1959) as follows: "In Centr-O-Cast & Engineering Company, 100 NLRB 1507, the Board established the rule that all petitions filed within the certification year of an incumbent union would be dismissed as premature. However, in Ludlow Typograph Company, 108 NLRB 1463, we held that where an employer and a certified union execute

quired to await the end of the certification year as well as the period more than sixty days but less than ninety days prior to the contract terminal date and either open or terminate the labor agreement in a timely manner as a condition precedent to questioning the continued bargaining authority of the Union in order to get any hearing at all before the Board.[5]

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one contract within the certification year, the certification year merges with the contract, after which there is no need to protect the certification further, and the contract becomes controlling with respect to the timeliness of the filing of a rival petition." Such has also been held to be the rule with respect to a petition filed by either party to the contract as well. Bert Wilkins Logging Co., Inc., NLRB Case No. 19-RM-294, July 6, 1960; Purity Baking Co., supra; Stroehmann Brothers Co., 120 NLRB 752 (1958)

[5] These rules are cited for the purpose of placing the facts of this case in the then existing posture of the applicable law. Such citation is not to imply that the rules are either correct or proper under the Act. The Board has the tendency to inaugurate new rules in its decisions without notice to the parties so that one never knows precisely what will be the disposition of his matter if the Board should choose it to enunciate a new rule applicable to the factual situation of that matter. This propensity of the Board to leave the labor law of our land in a never ending chaotic state is well illustrated by but a few examples. Compare U. S. Gypsum Co., 157 NLRB 652 (1966) with Whitney's, 81 NLRB 75 (1949) and Westinghouse Electric Corp., X-Ray Div., 129 NLRB 846 (1960); or compare Bernel Foam Products Co., Inc., 146 NLRB 1277 (1964) with Aiello Dairy Farms, 110 NLRB 1365 (1954) and M. H. Davidson Co., 94 NLRB 142 (1951); or compare Town & Country Mfg. Co., Inc., 136 NLRB 1022 (1962) and Fibreboard Paper Products Corp., 138 NLRB 550 (1962) with Mahoning Mining Co., 61 NLRB 792 (1945) and Walter Holm & Co., 87 NLRB 1169 (1949); or compare Great Western Sugar Co., 137 NLRB 551 (1962) with Whitmoyer Laboratories, 114 NLRB 749 (1955); or compare Quaker City Life Insurance Co., 134 NLRB 960 (1961) with Metropolitan Life Insurance Co., 56 NLRB 1635 (1944); or compare Local 41, Int'l Hod Carriers (Calumet Contractors Assn.), 133 NLRB 512 (1961) with Red Robin Stores, Inc., 108 NLRB 1318 (1954). See also Excelsior Underwear, Inc., 156 NLRB 1236 (1966). And precisely in point to the case at hand, compare C & C Plywood Corporation, 148 NLRB 414 (1964) with United Telephone Co. of the West, 112 NLRB 779 (1955) and Morton Salt Co., 119 NLRB 1402 (1958).

The labor contract provided that it was to continue to November 1, 1963 but could be opened for changes or terminated upon sixty days prior written notice to the other party. (Jt. Ex. 3, pp. 11-12, Art. XXI) Thus, under date of August 27, 1963, the Respondent Employers served notice upon the Union terminating that Agreement as of November 1, 1963.[6] (Tr. 30, Jt. Ex. 4) On August 28, 1963, precisely one year after the date of the certification of the Board and within the period permitted by Leonard Wholesale Meats (supra, n. 4, p. 5), the Respondent Employers filed a Petition with the Board seeking a representation election. (Tr. 31, Jt. Ex. 6(a) is covering letter; Jt. Ex. 6(b) is the Petition. This became Case No. 19-RM-484)

On August 29, 1963 the Union served notice upon the Employers by which it opened the labor contract to negotiate changes in it. (Tr. 30, Jt. Ex. 5)

Without a hearing, under date of September 26, 1963, the Regional Director of the Board dismissed the Employers' representation petition noting:

> "The investigation discloses that there is an unresolved unfair labor practice charge pending against the company which alleges, in addition to other matters, a refusal to bargain. No action can be taken on the instant representation case until that charge has been resolved." (Jt. Ex. 7)

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6 In that letter Respondents stated in part:
"This, of course, means that our present agreement will be in effect until November 1, 1963, and as in the past we stand ready to deal with you on any matters arising from the bargaining relationship or contract until that date.
"If this matter is not settled by November 1, 1963, please consider this as notice that we are withdrawing recognition of your Union on that date pending the outcome of the election.***" (Jt. Ex. 4)

The Employers promptly filed a Request for Review of that action of the Regional Director with the Board in Washington, D. C. (Tr. 32, Jt. Ex. 8) The Board on December 3, 1963, summarily, without hearing or explanation, affirmed the Regional Director's dismissal. (Tr. 32, Jt. Ex. 9)

In point of time the Trial Examiner's Decision recommending the total dismissal of the July 31, 1963 unfair labor practice charge was issued under date of January 3, 1964, although not received for a number of days thereafter. The Employers reasoned that the bar relied upon earlier by the Regional Director had been removed and on January 30, 1964 once again filed their petition with the Regional Director of the Board seeking a representation election to determine whether or not the Union continued to represent a majority of the Employers' employees. (Tr. 32-33, Jt. Ex. 10(a) is the covering letter and Jt. Ex. 10(b) is the Petition. This became Case No. 19-RM-500). Almost immediately thereafter, under dates of February 5 and February 7, 1964, the Union and General Counsel filed exceptions to the Trial Examiner's Decision. Then, on February 18, 1964, the Regional Director dismissed this second Petition.[7] The Respondent Employers promptly filed a Request for Review of the Regional Director's action with the Board in Washington, D. C. (Tr. 33, Jt. Ex. 12) On April 2, 1964 the Board summarily affirmed the Regional Director. (Tr. 33; Jt. Ex. 13)

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[7] Again the Regional Director, without a hearing, summarily dismissed the Petition in the following language: "As a result of the investigation, it appears that, because there is presently pending in this office unresolved unfair labor practice charge involving the same parties, further proceedings are not warranted at this time. I am therefore dismissing the petition in this matter." (Jt. Ex. 11)

The Respondent Employers on August 26, 1964, declined to further recognize the Union as the collective bargaining agent of any of their employees. (Tr. 38) This was but two days less than two years following the date of certification of the Union by the Regional Director of the Board.

The foregoing relates to the steps that occurred resulting in the Employers' refusal to further recognize and deal with the Union as the bargaining agent of any of their employees as well as the steps that had occurred in the unfair labor practice case filed January 31, 1963, the merits of which are not at issue here.

VI. The Current Unfair Labor Practice Proceedings.

The alleged unfair labor practice which forms the basis for this case was filed by the Union on November 5, 1964. (R. 3) The gravamen of the Complaint and the Amended Complaint is that the failure and refusal of Respondent Employers to continue to recognize and deal with the Union after August 26, 1964 constituted a violation of Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended.

The Trial Examiner considered this matter largely on stipulated facts. He first set forth the rule governing the effectiveness of a Board certification of a union as follows:

> "Certification of a union following a Board-conducted election gives rise to a conclusive presumption of majority (absent unusual circumstances) for a reasonable time, usually for a year, following the date of certification.[8] After the end of the certification year,

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[8] At this point the Trial Examiner footnoted: "Ray Brooks v. N.L.R.B., 348 U.S. 96; Terteling & Sons, Inc., d/b/a Western Equipment Co., 149 NLRB No. 28; Paris Mfg. Co., 149 NLRB No. 8; Ken's Building Supplies, 142 NLRB 235."

the presumption of majority continues, but it is then a rebuttable presumption,[9] and an employer may, if acting in good faith, rebut the presumption."[10] (R. 32-33)

The Trial Examiner then cites the Celanese Corporation case, supra, fn. 10, as setting forth two prerequisites as essential to a finding of an employer's good faith: "(1) There must be some reasonable grounds for believing that the union had lost its majority status since its certification; and (2) the majority issue must not have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that, in raising the majority issue, the employer was merely seeking to gain time in which to undermine the union." (R. 33) The Trial Examiner then reviewed the nature of the premium pay (July 31, 1963) unfair labor practice case, observed that there was neither any allegation nor finding of

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[9] Trial Examiner's footnote: "Bethlehem Steel Company, 73 NLRB 277; Dorsey Trailers, Inc., 80 NLRB 478; Toolcraft Corporation, 92 NLRB 655; Oneita Knitting Mills, 150 NLRB No. 54; Rohlik, Inc., 145 NLRB 1236; F. W. Woolworth Co. Store, 146 NLRB 848."

[10] Trial Examiner's footnote: "Perhaps the use of the word 'rebuttable' in connection with the word 'presumption' may contribute to difficulties in cases where a union's majority status is questioned after the end of the first year following certification. The word 'rebuttable' suggests that an employer who questions a union's majority at this time must come forward with positive proof that the union is no longer the representative designated by a majority of his employees. This is not true; for, if an employer has acted in good faith, he need only present facts which show that he has a reasonable ground for doubt of the majority status of the once certified union. Dixie Gas, Inc., 151 NLRB No. 126; Frito-Lay, Inc., 151 NLRB No. 6; F. W. Woolworth Co. Store No. 2367, 146 NLRB 848; Midwestern Instruments, Inc., 133 NLRB 1132; The Randall Company, Division of Textron, Inc., 133 NLRB No. 289; McCulloch Corporation, 132 NLRB 201; Stoner Rubber Company, Inc., 123 NLRB 1440; Celanese Corporation of America, 95 NLRB 664." (Emphasis supplied.)

bad faith on the part of the Employer involved (C & C Plywood) and ruled that the then pending unfair labor practice charges should not bar the Employers herein from questioning the Union's majority status. (R. 34, 35) Thus, he found that the second of the two prerequisites was met. This was the only facet of the case before the Trial Examiner pressed by the General Counsel and the Union. Although this issue was not raised by the General Counsel and the Respondents proposed evidence to establish a prima facie basis for its good faith doubt, the Trial Examiner found the stipulated facts were not sufficient to warrant the finding that the Employers had reasonable grounds for believing the union had lost its majority status since its certification. (R. 36-39)

The Employers filed Exceptions to the Trial Examiner's Decision; taking no exceptions to the finding that the antecedent unfair labor practice matter should in no manner bar the Employers from questioning the Union's majority status. The Employers limited their exceptions to the Trial Examiner's finding that there was not adequate evidence in the stipulated record to support their good faith belief that the Union had lost its majority status among its employees. Neither the Union nor the General Counsel filed exceptions.

In spite of the fact that no one raised any question concerning the Trial Examiner's finding that the premium pay unfair labor practice matter should in no manner bar the Employers questioning the Union's majority status, the Board rested its decision completely on its one issue, refusing to pass on the sole issue presented to it by the only set of exceptions before it.

The Trial Examiner's Decision was dated September 7, 1965. Employers' Exceptions were dated October 4, 1965. The Decision of the Board is dated April 13, 1967, more than nineteen (19) months following the Trial Examiner's Decision, an inexcusable delay.

Succinctly, the Board ruled: "We find that the prior unfair labor practice was of such character and effect as to preclude Respondents from thereafter questioning the Union's majority status in good faith." (R. 56) The Board then attaches to the facts of the premium pay unfair labor practice case a significance cognizable only in the most sophisticated labor law circles and certainly not so understood among the rank and file employees of this industrial complex. It is from this strained application of the statute that these Respondents resisted enforcement of this Decision of the Board to obtain the review of this Court. (163 NLRB No. 136)

ARGUMENT

I. Summary of Argument.

The Petition for Enforcement should be denied.

The unfair labor practice found by the Board in this case is wholly based upon the effect to be ascribed to the antecedent premium pay unfair labor practice. But for the antecedent premium pay unfair labor practice determination, the Employers would have been granted the orderly processes of the Board to determine whether or not the Union continued to represent a majority of their employees in the bargaining unit. In addition to other objective corroborating factors, the Employers had been told by many of their employees, members of the bargaining unit, that not only they but a majority of the employees in the bargaining unit no longer wished to be represented by the Union. The Employers, to insure a fair and expeditious determination, sought out the orderly processes of the Board petitioning it to conduct a secret ballot representation election. View the conditions that existed at that time. The certification year had expired. The labor contract had been opened (or terminated) by appropriate notice so that it did not constitute a bar. Under the procedures then effectuated by the Board in matters of this kind, such a representation election should have been granted. At that time the mere filing of a representation petition by the employer, without any proof or offer of proof concerning the basis of his good faith doubt of the union's continued majority status resulted in the direction of an election. While that rule has since changed, the objective evidence upon which the Employers then relied, would nevertheless be more than adequate under the present rules to satisfy the requirement of proof that there be a reasonable basis for a good faith doubt of the Union's continued

majority status among their employees. However, the Board refused the representation petition because the unproven premium pay unfair labor practice charge was pending. The Employers continued to recognize and deal with the Union. Subsequently, the Trial Examiner recommended dismissal of the Complaint, charging the premium pay unfair labor practice, finding that no unfair labor practice existed. The Employers again filed a petition with the Regional Director of the Board seeking a secret ballot determination of the Union status. The General Counsel and the Union appealed the decision of the Trial Examiner. The Regional Director refused to process the petition because of the pending premium pay unfair labor practice charge, although dismissal had been recommended by the Board's Trial Examiner. In each instance the Employers filed a Request for Review with the Board which was denied. Ultimately, almost two years after the date of the certification as alleged in the Complaint in this case, the Employers discontinued any recognition or bargaining with the Union.

Thus, but for the premium pay unfair labor practice, first charged but unproven, and certainly not proven at the time the majority status of the Union came into doubt, the issue of the Union's majority status among the employees would have been determined and the policies and purposes of the Act effectuated. The Board's rule, refusing to process a representation petition when an unfair labor practice charge is pending, is not authorized by the Act. It violates the Administrative Procedures Act and it violates the right to due process and a fair hearing. Nothing in the Act relating to its representation functions authorizes the Board to "effectuate the

policies of the Act." Nothing in the Act permits the Board to find the existence of an unfair labor practice until a fair hearing and due process have become an accomplished fact and the preponderance of the testimony supports the finding of unfair labor practices. Only after an unfair labor practice has been found does the Board have the authority to provide a remedy "to effectuate the policies of the Act." At that time, if the unfair labor practice is so grievous and flagrant as to warrant unrestrained sanctions, the Board may order bargaining without an election even though within the immediately prior period an election was held in which the union involved was defeated. Thus, it does not effectuate the policies of the Act to deny an election simply because an unproven unfair labor practice charge is pending. When the rule is examined and it is also noted that the Board will make an exception to it whenever it suits its purposes, or because the charging party has filed a waiver, the rule appears clearly arbitrary and capricious. If the rule is valid, a waiver by the charging party should not warrant setting it aside. Under the application of this rule by the Board, a labor union is given the privilege of governing the procedures of the Board to its selfish ends, which is certainly not the policy or purpose of the statutory scheme.

The finding that the premium pay plan was an unfair labor practice should not later bar a refusal by the Employers to recognize and bargain with the Union. The General Counsel did not establish by any evidence, let alone substantial evidence, that there was any connection between the premium pay plan unfair labor practice and the ultimate loss of majority status by the Union among the Em-

ployers' employees. There is nothing to show that the loss of majority status by the Union was in any manner caused by or connected with the premium pay unfair labor practice. The premium pay plan unfair labor practice itself was neither grievous nor flagrant. The most that can be said for it is that it constituted a "technical" unfair labor practice. There has been absolutely no showing of any anti-union animus on the part of either Employer. There has been absolutely no showing that the direct or indirect purpose of the premium pay plan was to undermine the union, cause disaffection from the union or made in conjunction with other acts designed to accomplish that purpose. The undisputed fact is that the Employer, C & C Plywood, believed in good faith and candid honesty that it had the unequivocal right under specific language of its labor contract with the Union to establish and implement the premium pay plan. The Trial Examiner before whom the witnesses testified in the first instance was satisfied that the conduct of C & C Plywood's manager was completely honest and in good faith. Factually, the evidence is not that there was any intent to avoid the collective bargaining obligation. The situation was, in perspective, one which could be described as "neglecting to bargain" because of a reliance on an erroneous interpretation of the labor contract rather than a "refusal" to do so. No malicious motive, design or scheme designed to injure the Union can be found or legitimately implied in the premium pay plan action of C & C Plywood.

The Board and the Courts have long recognized that there are differences in degree of the gravity of unfair labor practices and, as a consequence, have varied their remedies. To this end,

the Board and the Courts have applied the bargaining requirement with great restraint. Good judgment compels that restraint be exercised in this case and that a bargaining order is not the solution to either the premium pay unfair labor practice matter or this matter.

The underlying policy of the Act is to effectuate the wishes of the employees. Unless it can be shown that the wishes of the employees have been so frustrated by the existence of a prior unfair labor practice that those wishes cannot be given unfettered voice at the time that voice should be heard, then that unfair labor practice should not impair the effectuation of the wishes of the employees. The burden of proof was upon the General Counsel to show, if he could, that the premium pay unfair labor practice prevented the unfettered expression of employee wishes for an unfair labor practice in this case to be found. This he has not done. There has been absolutely no causal relationship shown between the premium pay unfair labor practice and the loss of Union majority status among the employees. Thus, the ultimate withdrawal of recognition from the Union was valid and not an unfair labor practice.

The Board, in its Brief, cites Board authority seeking to extend the certification year because of the Employers' failure to bargain with the Union prior to establishing the premium pay plan. The authorities that it cites uniformly hold two facts in common which are completely distinguishable from the case at bar: (1) in none of those cases had the first collective bargaining agreement been negotiated and executed; and (2) there was a total cessation of recognition of the union or bargaining for an extended period of time. The purpose of a certification is to provide a protective shield under

which the bargaining agent may negotiate its first contract without fear of intervention from a rival organization. The purpose of the certification rule was an accomplished fact in the case at bar. The first collective bargaining agreement had been negotiated and signed. The parties complied with it and the bargaining relationship continued under it without any problems other than the disagreement over whether or not C & C Plywood could establish the premium pay plan. Recognition of the Union was not withheld; bargaining proceeded in all other respects as though there was no difference existing between the parties. Thus, the purpose for extending the certification year found in other cases which gave rise to the Board rule simply does not exist in this case.

The premium pay unfair labor practice is so technical in nature that first the Trial Examiner, later an eminent member of the Board and finally this Court did not believe that it existed. Under such circumstances disaffection from the union should not be imputed as a result of it. In any event, the burden of proving that the premium pay unfair labor practice was the factor bringing about the loss of majority status and thus causing the circumstances of the current case to be an unfair labor practice was that of the General Counsel. This burden he failed to sustain.

In denying the Petition for Enforcement in this matter, it is urged that this Court also modify its Decree in the prior case or in the alternative direct the Board to modify its Order in the premium pay unfair labor practice case. Otherwise the thrust of the Order in the earlier case will result in compelling bargaining when the Union has lost its majority status.

II. The Issue.

The prime issue before this Court is whether or not it should grant the Petition of the National Labor Relations Board to enforce its Decision and Order against the Respondent Employers, C & C Plywood Corporation and Veneers, Inc., herein.

This brings into question, whether or not, in the circumstances of this case, the Board's Order requiring the Respondent Employers to continue to recognize and deal with the labor union, whose majority status among their employees is questioned in good faith and for valid reasons, is correct.

Also fundamental to the determination of the prime issue is the question of whether or not the General Counsel carried the burden of proof before the Trial Examiner and the Board which was upon him to establish that the Employers did, in fact, engage in any unfair labor practices.

The points exceedingly important to the deliberation of this case include:

1. The Employers, as found by the Trial Examiner, recognized and dealt with the certified union for two years, less four days, from certification. (R. 39-40) And, for one year after the certification the Employers had ample objective evidence to support a good faith doubt of the certified union's continuing majority status among its employees.

2. The Employers, in a timely manner, twice sought and were twice denied the orderly and reasonable statutory procedures of the Board to obtain a secret ballot representation election to ascertain the true desires of their employees; first, denied simply because an unproven unfair labor practice charge was pending and,

second denied after the complaint based upon the unfair labor practice charge had been dismissed and before it was appealed to the Board. The Employers' intent to abide by the results of the election is unquestioned.

3. Consider an analysis of the premium pay unfair labor practice ultimately found to exist and its impact upon this situation. For example, does every unfair labor practice charge, proven or unproven, grievous or inconsequential, clearly understood or vague so that its impact upon the employees themselves is highly questionable, merit an equal impact forcing continuance of the bargaining relationship irrespective of the wishes of the employees? Is not the fact that the unfair labor practice is found to exist in a setting totally lacking in malice, bad faith or anti-union animus material to the impact given to that unfair labor practice? Does the fact that the unfair labor practice was found to turn on an interpretation of a labor contract that had long since ceased to exist when the unfair labor practice was ultimately judicially found, warrant frustration of the will of the employees for an unlimited future period of time?

4. Does the finding of an unfair labor practice against but one of the two employers involved in a bargaining unit permit the Board to punish the employees of the innocent employer and the innocent employer by barring them from an orderly determination of the status of the bargaining representative?

5. Procedurally, is the Board free to review an issue resolved by the Trial Examiner under circumstances in which no party takes or files any exceptions to it and the Board provides no indication, notice or hearing that it will consider or review that issue?

III. The Effect of the Board's Certification of Union.

The Union was certified by the Regional Director of the National Labor Relations Board as the collective bargaining agent of the employees of C & C Plywood and Veneers, Inc. on August 28, 1962 following a representation election in which the Union was victor on July 6, 1962. The effect of such a certification is set forth by the Board in Celanese Corporation of America, 95 NLRB 664, 671-2 (1951) as follows:

> "It is appropriate, at the outset, to set forth the legal principles controlling in situations of this type, and particularly to indicate the relationship between the existence of a Board certificate and the right of an employer to question a union's majority in good faith. In the interest of industrial stability, this Board has long held that, absent unusual circumstances, the majority status of a certified union is presumed to continue for 1 year from the date of certification. In practical effect this means two things: (1) That the fact of the union's majority during the certification year is established by the certificate, without more, and can be rebutted only by a showing of unusual circumstances; and (2) that during the certification year an employer cannot, absent unusual circumstances, lawfully predicate a refusal to bargain upon a doubt as to the union's majority, even though that doubt is raised in good faith. However, after the first year of the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the union, the presumption is at that point rebuttable even in the absence of unusual circumstances. Competent evidence may be introduced to demonstrate that, in fact, the union did not represent a majority of the employees at the time of the alleged refusal to bargain. A direct corollary of this proposition is that, after the certificate is a year old, as in cases where there is no certificate, the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, provided that the doubt is in good faith."

This principle was, in substance, affirmed by the United States Supreme Court in Brooks v. N.L.R.B., 348 U.S. 96 (1954).

Following the Celanese Corporation case, the Board

further clarified the purpose of this certification rule in Ludlow Typograph Co., 108 NLRB, 1463, 1464-5 (1954). That amplification follows:

> "* * *It must never be forgotten that the Act is designed primarily to protect the right of employees to self-organization and that the refusal to conduct an election when a substantial number of employees have indicated a desire to change bargaining representatives is a restraint on that right. Such a restraint for a reasonable period of time, as after a certification, may be necessary to achieve a measure of stability in labor relations, but it should not extend beyond what is absolutely essential for the establishment of sound labor relations. The original reason for the 1 year certification rule was to afford time to the certified union and the employer for negotiating a collective-bargaining agreement free of interference by rival claims of representation. The rule itself was a pronouncement of the Board and is nowhere required by the Act. In the Board's experience, 1 year is adequate time for the certified union and the employer to reach agreement on terms and conditions of employment, if they are ever to do so. But, if the parties are able to agree on a collective-bargaining contract in less than the 1 year allotted, there is no sound reason for saying that they shall have the remainder of the year to make a second or third contract free of interference by rival claims of representation."

The foregoing conclusively illustrates that the prime purpose of the Act is to reflect the wishes of the employees with respect to the matter of their bargaining representative. It also substantiates that the purpose of the certification rule is to permit the negotiation of the first collective bargaining agreement without intervention. Such was accomplished within the certification year in the matter here at bar when negotiation of the labor agreement was completed on April 19, 1963 and that agreement reduced to writing and signed on May 1, 1963. Thus, the application of the Board's rule in Mar-Jac Poultry Co., Inc., 136 NLRB 785 (1962) in the case at bar is

totally inappropriate.[11] In that case the employer absolutely declined to recognize and deal with the union before the certification year had expired and had at no time executed a labor contract with the union. The unfair labor practice of the employer in that case was a most grievous one, a total refusal to bargain by which the employer rejected the principle of collective bargaining espoused by the Act after a bargaining agent had been selected. As the Court noted in N.L.R.B. v. Gebhardt-Vogel Tanning Co., ---F.2d---, 67 LRRM 2364, 2367 (C.A. 7, Jan. 22, 1968):

> "It hardly appears necessary to discuss the principle announced in Mar-Jac Poultry Co., Inc., 136 NLRB 785, upon which the Board relies here. The holding in that case, in substance, is that where a union is deprived of the opportunity to bargain for a substantial portion of the certification year through no fault of its own, the Board may properly extend the union's right to bargain for an equivalent period of time. We assume this is a sound principle, but its utilization is dependent upon the factual situation to which it is sought to be applied."

In the Gebhardt-Vogel case, as in the case here at bar, the Board relied on N.L.R.B. v. Commerce Co. d/b/a Lamar Hotel, 328 F.2d 600 (C.A. 5, 1964) and N.L.R.B. v. Burnett Construction Co., 350 F.2d 57 (C.A. 10, 1965) as illustrating that the Courts have approved this principle of extending the certification

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[11] The Board seeks to apply its Mar-Jac Poultry case rule to this case in its Brief to this Court at pp. 10-11. That case is not only totally inapplicable to the case at bar for the reasons noted above but also there has been no showing in this case that the Employers at any time rejected the principle of collective bargaining or ceased to bargain with the union with respect to all other aspects of their relationship during the balance of the certification year and the term of the collective bargaining agreement. The fact is that the only employer failure in the collective bargaining relationship was C & C's establishment of the premium pay plan which it believed it could inaugurate under the terms of its labor contract with the union.

year.[12] However, in each of those cases no collective bargaining agreement had been reached or entered into during the certification year and there was a total rejection of the principle of collective bargaining with the union involved during that certification year. In the Burnett case the total refusal to bargain occurred within five months of the certification and while it is not clear from either the Board or Court report in the Commerce Co. case, it would appear that bargaining for a first contract ceased within six months of the certification. The first collective bargaining agreement was not brought to fruition in either case.

Thus, it can be readily understood that the Board's rule in it's Mar-Jac Poultry case is totally inapplicable to the case at bar. A first collective bargaining agreement had been reached and was actively governing the relationship of the Employers and the Union well within the first year of certification. Attention is directed to the fact that this labor contract was not a simple instrument nor a cursory effort. It was a comprehensive contract dealing with almost every area

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[12] Board's Brief pp. 10-11, 19-20. Also cited by the Board at pp. 10-11 as supporting this principle are: N.L.R.B. v. Miami Coca-Cola Bottling Co., 382 F.2d 921 (C.A. 5, 1967), N.L.R.B. v. John S. Swift Co., 302 F.2d 342 (C.A. 7, 1962), Superior Engraving Co. v. N.L.R.B., 183 F.2d 783 (C.A. 7, 1950) cert. denied 340 U.S. 930, W. B. Johnston Grain Co. v. N.L.R.B., 365 F.2d 582 (C.A.10,1966) However, each of those cases is equally distinguishable from the case at bar since in none was a collective bargaining agreement negotiated and signed during the certification year and in every case there was a total, even hostile, rejection of the collective bargaining principle within the period in which this first agreement should have been executed. In the case at bar the one Employer involved did not believe that its conduct, which was eventually found to constitute an unfair labor practice, was in any manner in derogation of its collective bargaining responsibility. Instead, it believed that it was in full compliance with its labor contract and its collective bargaining responsibility. It quickly met with the Union when the union made its objections known to the inauguration of the premium pay plan and offered to fully discuss it but the Union declined insisting on unequivocal rescission of the plan.

of the employer-employee relationship. (Jt. Ex. 3) There is absolutely no evidence of any kind that Veneers, Inc. at any time did anything which impugned its complete adherence to that contract. The record also does not show any refusal to completely and totally adhere to the terms of that Working Agreement and to otherwise comply with the principles and purposes of collective bargaining including the complete recognition of the certified labor union by both Employers with but one very technical exception. That exception was the good faith reliance, now judicially determined to have been erroneous, upon its interpretation and application of that portion of the labor contract under which it instituted, unilaterally, the premium pay plan for members of its glue spreader crews. Except for that one incident, both during the first year of the certification and including the additional period through to the end of the first contract, the Employers recognized and dealt with the Union as the bargaining agent of their employees in every particular.[13] To say that that one act caused injury to the bargaining

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[13] The Board Brief (p. 17) is totally irresponsible in characterizing the conduct of the General Manager of both Employers as "flouting of the Union's certification" in his act of unilaterally announcing the premium pay plan. The Employer did so in a good faith reliance upon a provision of its labor contract. The Trial Examiner in his decision in the premium pay case noted: "Despite the contrary contention by General Counsel and the Charging Party's representative, no persuasive demonstration has been proffered that Respondent's management--when it promulgated the disputed premium pay plan for glue spreader crew members--was acting in bad faith." "General Manager Thomason's decision--so far as the record shows--was consciously reached within the framework of his firm's contract, as he construed it, and did not reflect a deliberate attempt to modify or terminate it." "Though Respondent's management, clearly, refused to concede any lack of propriety or justification with respect to the firm's promulgation of the disputed premium pay plan, spokesmen for the Company made manifest, throughout, their readiness to negotiate regarding the specific terms and conditions under which premium pay would be awarded workers on glue spreader crews. Representatives of the Charging Party, however, made no effort to bargain regarding the plan's content. With matters in their present posture, therefore,

agent or tended to undermine the Union's authority is simply to turn one's back on the realities of present day industrial relations. It is unreasonable to assume that any labor union or any employee would read into these honest actions, taken in good faith, in reliance upon clear contract language the existence of conduct aimed at destroying the status of the bargaining agent or its bargaining agency. No labor union and no employee member of a labor union expects to obtain employer acquiescence to every position taken by such a union, whether it be a contractual interpretation, the disposition of a grievance or a demand in bargaining. The failure of the labor union to prevail in every such case or in any such case does no injury to the status of the bargaining agent. A labor union is known for its strong positions and its vehement advocacy of them. This is the substance of which difficult bargaining sessions are made and out of which strikes occur. Certainly in the industrial relations arena it would be inequitable to give the labor union all of these freedoms while tying the employer's hands behind his back and blindfolding him as well.

Admittedly the action that C & C Plywood took in establishing the premium pay plan has now been found to be an unfair labor practice. But, in spite of that, C & C Plywood met promptly with the Union when

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13 (cont.) Respondent cannot be found in default--upon this ground either--with respect to its statutory obligation to bargain." Thus it can be seen that C & C Plywood was not "flouting" the Union's certification. The parties stipulated that official notice be taken in these proceedings of the Trial Examiner's decision and the decision of the Board in the premium pay cases. (Tr. 28) The Board's decision was reported at 148 NLRB 414. The Trial Examiner's Decision is a part of the prior record of this case before this Court in case number 19769.

requested and twice discussed the plan, providing the Union with a forum for the resolution of the matter and an opportunity to thoroughly discuss the matter. The Employer was also willing to discuss the plan in detail but the Union declined to do so. Furthermore, the Employer continued to recognize the Union with respect to all other matters the subjects of bargaining between them and would have negotiated the premium pay plan with the Union if the Union had been willing to do so. Such conduct is not in derogation of the status of the bargaining agent.

The protective purpose of a certification, to give the certified union the unfettered opportunity to reach its first agreement with the employer without fear of a rival organization or employee disaffection intervening, had been fully accomplished in the case here at bar. There was, therefore, no reason to extend that period of protection provided by a certification in this case.

And, as against the protective purposes of the certification the prime purpose of the Act should not be forgotten, for it is not the union's wishes, but those of the employees involved that are supreme. As the Court stated in Philip Carey Manufacturing Co. v. N.L.R.B., 331 F.2d 750, (C.A. 6, 1964):

> "It is appropriate to note here a statement by Judge Friendly in the Superior Fireproof Door case:[14] 'Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself.' * * *"

This also confirms the remarks of the Ludlow Typograph case, supra, that:

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[14] N.L.R.B. v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (C.A. 2, 1961)

> "* * *It must never be forgotten that the act is designed primarily to protect the right of employees to self-organization and that the refusal to conduct an election when a substantial number of employees have indicated a desire to change bargaining representatives is a restraint on that right." (108 NLRB at 1464)

The employee wishes can best be determined and expressed in a secret ballot representation election which the Board unilaterally and arbitrarily denied in this case.

As the Supreme Court stated in Franks Brothers Co. v. N.L.R.B., 321 U.S. 702, 705 (1944):

> "* * *For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop. See Great Southern Trucking Company v. National Labor Relations Board, 127 F.2d 180, 183.* * *"

While the Board's argument, in its Brief, to impose upon this case its Mar-Jac Poultry case rule has been fully answered herein, it seems to the Respondent Employers that its doing so for the first time in its Brief to this Court is error. Neither the Board in its Decision, nor the Trial Examiner in his, sought to rely upon Mar-Jac Poultry but, instead, relied totally upon one of the aspects of the Board's Celanese Corporation of America case, supra, dealing with whether or not the Employers' questioning of the Union's continued majority status was in good faith. This is another strange aspect of this case. While the Trial Examiner and the Board each relied in their decisions on the application of the rules enunciated in the Board's Celanese Corporation case, the Board's Brief to this Court is completely silent with respect to mentioning that case or its principles. However, since this case in the two prior considerations turned on that case, we now direct this Court's attention to the application of its rules in some depth.

IV. The Employers Questioned the Union's Majority Status and Ultimately Declined Further Bargaining with the Union in GOOD FAITH.

A. Introduction

Both the Trial Examiner and the Board turned the Decision that each rendered in this matter on the application that each placed upon the good faith test enunciated by the Board in Celanese Corporation of America, 95 NLRB 664 (1951). In that decision (at p. 673) the Board set forth the rule as follows:

> "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case. But, among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith in cases in which a union has been certified. There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status since its certification. And, secondly, the majority issue must not have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union."

The Trial Examiner found that the Employers satisfied the second test set forth above but did not satisfy the first test. The Board, on the other hand, concerned itself first with the second test and disagreed with the Trial Examiner claiming the Employers here did not satisfy that test, then finding it unnecessary to rule on the application of the first test to the case at bar.

B. The Employers had Reasonable Grounds for Believing the Union had Lost Its Majority Status among their Employees.

Applying the tests of the Celanese case, the first requires that the Employers must have "some reasonable grounds for believing

that the union had lost its majority status since its certification."

The pertinent stipulated facts, which clearly show that the Employers here had more than was required under Board rules to establish reasonable grounds for believing the union had lost its majority status, is found in the following portion of the hearing transcript:

> "It is also stipulated and agreed that the Respondent Employers in the matter here pending would produce witnesses, the substance of their testimony being that it became known to officials of Respondent Employers and to employees around the operation of the Respondent Employers here involved that many employees no longer wished to be represented by Local Union No. 2405; that many employees, including many hired after the date of the certification of the union, were and are openly opposed to Local Union No. 2405 continuing as the bargaining agent of the employees of the Respondent Employers in the unit found appropriate for collective bargaining by the Regional Director of the Board in Case No. 19-RC-3041. That such witnesses, members of the bargaining unit, would testify that in their opinion a majority of the employees in the unit found appropriate no longer wished to be represented by the union (Local 2405) and so informed management officials of these Respondent Employers. That the factual circumstances giving rise to Respondent Employers' claim of doubt arose in the period beginning on or about July 15, 1963, and has continued at all time pertinent to this matter thereafter to and including the time of this hearing. Respondent Employers would produce testimony which would show that there were one hundred forty-five employees in the collective bargaining unit found appropriate at the time of the representation election held July 26, 1962, one hundred thirty-four of whom were eligible to vote in that election. On September 3, 1963 there were two hundred and one employees in the collective bargaining unit found appropriate of which seventy-eight were in the employ of the Respondent Employers in July, 1962. On February 7, 1964 there were one hundred eighty-four employees in the collective bargaining unit found appropriate of which sixty-eight

were in the employ of the Respondent Employers in July, 1962." (Tr. 28-30) [15]

And, while the foregoing is more than adequate to substantiate that any reasoning being would find such facts adequate to support a good faith doubt of the Union's continued majority status among the employees of the Employers, that fact is emphasized by the exchange of correspondence between the Employers and the Union under dates of March 11, 1964 and March 12, 1964 in which the Union declined to independently establish its continued majority status. (Jt. Ex. 18 and 19)

What more does an employer need to give rise to "reasonable grounds for believing that the union has lost its majority status since its certification?" Here the Employers had (1) the representation by a number of employees within the bargaining unit that they did not wish to be further represented by the union; (2) the representation by a number of employees within the bargaining unit that such was not just their own feeling but that of a majority of the employees within the bargaining unit; (3) that there was open opposition to the union's

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[15] The Trial Examiner erroneously construed this portion of the stipulation as an offer of proof. (R. 36, 37) An examination of the stipulation illustrates that in acceding to the stipulation the General Counsel did not question the authenticity or the veracity of the testimony stipulated to by the parties. Instead, he simply objected to its introduction "on the grounds of relevancy to the issues involved in this matter and does so object; however, if his objection is overruled, it is stipulated that such would be the testimony of several witnesses." (Tr. 30) The Trial Examiner turned his decision on the question of the Employers' factual basis for questioning the Union's continued majority status among the employees. (R. 38) Thereby he overruled General Counsel's objection to the relevancy of this evidence so that the portion objected to became evidence in these proceedings, not an offer of proof. Furthermore, there is nothing in the stipulation to indicate that this was presented to the Trial Examiner as an offer of proof in any event.

continued representation within the plant involved by many of the employees within that bargaining unit; (4) that there had been a substantial change in the number and in the personnel composing the workforce within the bargaining unit since the certification; (5) the witnesses upon which the Respondents relied included "members of the bargaining unit" so that the evidence was concrete and not based upon theoretical assumptions or as the Trial Examiner sought to characterize them "wishful thinking." (R. 38); (6) that all of these factors were known to the management of the Employers; and, (7) the correspondence with the Union of March 11 and 12, 1964 confirmed the Union's own doubt of its continued majority status.

Certainly such factors would be more than adequate to establish a good faith doubt of the Union's continued majority status among employees under the rules that have been developed by the Board since this case arose.

At the time that this case arose, the Board was applying the rule in representation matters that when an employer requested an election to determine whether or not a certified bargaining agent continued to be the majority representative of its employees, the existence of a good faith doubt on the part of the employer involved was not to be litigated and actually the employer had to provide no proof even administratively to the Board to establish the validity of his good faith doubt. This rule prevailed during the period in which these Employers were questioning the continued majority status of this Union in the period from August 28, 1963 through August 24, 1964. It was not until the Board's decision in U. S. Gypsum Co., 157

NLRB 652 (March 11, 1966) that the Board changed this rule with respect to representation matters before it so as to equalize the application of this rule in both unfair labor practice matters and in representation matters.

In the U. S. Gypsum case (at pp. 654-5) the Board set forth this distinction and eliminated it in the following language:

> "The Board has long held that a question concerning representation is raised with respect to the status of an incumbent union if an employer files a petition under Section 9(c)(1)(B) and shows only that the union has claimed representative status in the unit and the Employer has rejected or otherwise questioned that status. In so holding, the Board has not, in such representation proceedings, questioned the good faith of the employer's refusal to grant to the union continued recognition.* * * On the other hand, in unfair labor practice cases the Board has consistently held that there is an irrebuttable presumption that the majority status of a certified union continues for 1 year from the date of certification; that thereafter the presumption is rebuttable, and an employer may lawfully refuse to bargain only if it can show by objective facts that it has a reasonable basis for believing that the union has lost its majority status since its certification.* * *"

The Board concluded (at p. 656):

> "In light of the above, we are of the view that we should no longer adhere to the former interpretation of Section 9(c)(1)(B). We therefore now hold that in petitioning the Board for an election to question the continued majority of a previously certified incumbent union, an employer, in addition to showing the union's claim for continued recognition, must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification.* * *"

Subsequently, in a later case involving the same parties, i.e., U. S. Gypsum Co., 161 NLRB No. 61 (Oct. 28, 1966) the Board further clarified this rule. It held that the employer's reasonable basis for doubting the union's continued majority status among the employees need not be litigated. Instead, it held that the objective

evidence was to be submitted by the employer to the Regional Director of the Board and that the Regional Director was to administratively determine the adequacy of that objective evidence. Actual practice under these decisions in the same Region of the Board in which this case arose illustrates that the evidence submitted by the Employers in the case at bar would be considered more than adequate to establish a reasonable, good faith doubt of the union's continuing majority. This Region has been consistently satisfied administratively with the provision by the employer, normally in written form, of the names of the employees who represent to the management of the employer that they and, in their opinion, a majority of the employees in the bargaining unit no longer wish to be represented by the incumbent union.[16] (Exchange Lumber & Manufacturing Co., Case No. 19-RM-697, decided by the Regional Director on January 2, 1968 and Request for Review by the union involved denied by the Board on January 31, 1968. Ahsahka Lumber & Milling Co., 19-RM-666, election held May 19, 1967. Post Falls Lumber Co., 19-RM-663, election held May 18, 1967. Unfortunately, each of these are unreported decisions.)

As a consequence of the foregoing, it is established that

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[16] Because the Board treats an employer's probing of its employees wishes with respect to continued union representation with the utmost circumspection, the employer should not be expected to know more or show more than that which is voluntarily conveyed to it by its employees. Employer interrogation can, by itself, lead to independent unfair labor practices or bar the Board's holding of a representation election. (N.L.R.B. v. Lorben Corp., 345 F.2d 346, C.A. 2, 1967; Struksness Construction Co., 165 NLRB No. 102, 1967; Union News Co., 112 NLRB 420, 1955; Blue Flash Express, Inc., 109 NLRB 591, 1954. Cf. Stoner Rubber Co., 123 NLRB 1440, 1959, in which the Board recognizes these limitations on an employer.)

these Employers did have ample objective evidence upon which to rely in forming their good faith belief that the Union no longer represented a majority of their employees.[17]

C. The Question of the Continuing Majority Status of the Union among the Employees was NOT Raised in a Context of Illegal Antiunion Activities.

That portion of the Celanese rule to which this discussion is pointed is stated:

> "* * *And, secondly, the majority issue must not have been raised by the employer in a context of illegal anti-union activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." (95 NLRB 673)

This rule is prefaced earlier in the same paragraph by the statement that the issue of whether an employer has questioned a union's majority in good faith "can only be answered in light of the totality of all of the circumstances involved in a particular case." (Emphasis supplied.)

The Trial Examiner found that the Employers here satisfied the requirements of this prerequisite to establish their good

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[17] The Trial Examiner appears to rely on Laystrom Manufacturing Co., 151 NLRB 1482 (1965) that the Employers' factual basis for a good faith doubt of the Union's continued majority was "tenuous." (R. 35, 37) However, in the Laystrom case the employer sought to show that various employees had indicated dissatisfaction with the union but refused to name any of those employees so that the Trial Examiner there rejected the testimony because the General Counsel would have no opportunity to meet the testimony and the employer there did not except from that ruling. Here, on the other hand, witnesses who were members of the bargaining unit would have appeared on the witness stand so that there would have been no question of who was testifying and the General Counsel would have had every opportunity to cross examine and to meet the testimony with his. The factual situation of the Laystrom case thus is totally distinguishable from the case here at bar.

faith. The Board, on the other hand, disagreed relying solely upon its antecedent premium pay unfair labor practice finding. (R. 56)

The Board's application of this test, in the circumstances of this case, defies reason and good judgment.

First, the Board relies upon an unfair labor practice finding which not only this Court in a unanimous decision (351 F.2d 224), but an eminent member of the Board itself (Boyd Leedom) and a competent Trial Examiner of long tenure (Maurice M. Miller) did not believe to exist. If the factual situation upon which the unfair labor practice finding rests is so difficult to understand that men learned in this area of jurisprudence cannot agree that one exists, it is an absurdity to say that the impact of such an unfair labor practice impugns the good faith of the so-called perpetrator of the unfair practice.

Secondly, under these circumstances, where learned men skilled in this area of jurisprudence cannot agree that an unfair labor practice exists, it cannot be said that factory workers, members of the bargaining unit, are so affected by the so-called unfair labor practice conduct as to cause their disaffection from the union.

Third, the posture within which the unfair labor practice was found to exist totally denies that the employer involved had even the remotest dream that his conduct in any manner either constituted an unfair labor practice or would be interpreted as an effort to undermine the union. The most thorough examination of the antecedent unfair labor practice case will not turn up one iota of evidence that the employer's conduct was not in good faith, or surrounded by a general aura of antiunion animus, or made in conjunction with other

acts which manifested a plan to destroy the union or that it entertained any antiunion hostility, or that it rejected the principle of collective bargaining. Certainly the "totality of all of the circumstances" vindicates these Employers and destroys the Board's application of the Celanese rule.

Fourth, the unfair labor practice found to exist in the antecedent case was against but one of the Employers involved in the bargaining and in no manner affected the other Employer or its employees. Why, then, should all of the employees and the innocent Employer be barred from a determination of the true wishes of the employees because of a highly technical unfair labor practice?

Fifth, the totality of the conduct of the Employers illustrates conclusively that there was no aim to cause union disaffection among the employees and no attempt to gain time in which to undermine the union.

There is absolutely nothing in the record which indicates that the Employers or either of them ceased to recognize and bargain with the Union after inaugurating the premium pay plan on May 20, 1963. The record of the earlier case shows that the Employer, C & C Plywood Corporation, met twice with the Union shortly after the Union first objected to the adoption of the plan. While the Union steadfastly insisted that the plan be rescinded, which the Employer refused, it nonetheless indicated a willingness to discuss the plan, how it worked, what changes might be adopted, etc., for the plan itself was announced simply as a temporary measure to be tried for a couple of months. But the Union was obstinate, it wanted the plan revoked, so it filed its unfair labor practice charges. Bargaining

with the Union continued without interruption. The Union's authority was in no manner questioned by anyone through the balance of the term of the labor contract. Grievances were processed and bargaining was handled as though the antecedent unfair labor practice had not occurred. When the Employers did notify the Union of their intent to terminate the labor contract upon its anniversary date, November 1, 1963, more than fourteen months following the certification, their letter made it clear that the contract would be enforced to that date and that bargaining would continue, as before.[18] The Employers then filed their Petition with the Regional Director of the National Labor Relations Board clearly illustrating that they were not going to reject the Union unilaterally and without a fair determination of whether or not the Union, in fact, continued to represent a majority of their employees.[19] The Regional Director, without a hearing or other notice, refused to process the petition simply because an unproven, actually a highly speculative, unfair labor practice was pending. The Employers promptly followed the only course open to them under

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[18] See n. 6, p. 7 supra.

[19] The failure of an employer to invoke the Board's processes by filing a petition to determine the status of the Union as bargaining representative has been held to be an indicia of the employer's lack of good faith. Toolcraft Corporation, 92 NLRB 655, 656, n. 5 (1950); United States Gypsum Co., 90 NLRB 964, 968 (1950). Conversely, the Court in N. L. R. B. v. Dan River Mills, Inc., 274 F.2d 381, 389 (C.A. 5, 1960) said: "Under the special circumstances of this case, it was reasonable for the Employer to assume that the law would resolve his good faith doubt concerning the Union's majority by the election requested and shortly ordered. The subsequent dismissal of these proceedings with the filing of the unfair labor complaint cannot deprive his interim actions of that cloak of reasonableness and good faith doubt.* * *"

the Rules and Regulations of the Board and filed a Request for Review with the Board itself in Washington, D. C. (Rules and Regulations, National Labor Relations Board, Series 8, Rev. Jan. 1965, Sec. 102.67, 29 CFR 102.67(b)ff) The Request for Review was denied. After the Trial Examiner dismissed the complaint, based upon the antecedent unfair labor practice allegation, the Employers once again sought to obtain an orderly and peaceful resolution of the Union's bargaining agency status. Even though no appeal of the Trial Examiner's Decision was then pending, the Regional Director refused to process the Petition and the Employers again filed a Request for Review with the Board in Washington, D. C. That the Employers' conduct throughout this period was not considered to constitute or be evidence of a refusal to bargain or an unfair labor practice is further illustrated by the allegation of the Complaint and Amended Complaint in these proceedings which fixes the date upon which the Employers' refusal to recognize and deal with the Union occurred "on and after August 26, 1964." (R. 5, 14) The fact that the Employers sought to resolve this matter within the processes of the Board and did not unilaterally take the matter into their own hands until long after it became apparent that the Board was not going to perform its statutory responsibility to determine the status of the bargaining representative further establishes the good faith of the Employers herein.

The pendency of an unfair labor practice has not always prevented the processing of a petition for a representation election before the Board nor barred an employer from refusing to grant further recognition to a union when the employer has satisfactory

evidence that the union has lost its majority status with the employees. The two cases relied upon by the Trial Examiner in this case in deciding that the premium pay unfair labor practice finding should not bar the Employers' questioning of the Union's continued majority status bears this out.

In the first case, Mission Manufacturing Co., 128 NLRB 275 (1960) the employer was found to have engaged in a refusal to bargain unfair labor practice by barring union representation on grievances during the existence of a strike by that union. Thereafter, the number of employees crossing the picket line became so great that the employer refused further recognition of the union. The Board held that the unfair labor practice did not bar the employer's good faith refusal to recognize the union because it no longer represented a majority of its employees. It is noteworthy that the Board, in the case at bar here, in its reversal of the Trial Examiner, failed to comment on the Trial Examiner's reliance on the Mission Manufacturing case.

The second case cited by the Trial Examiner was Midwestern Instruments, Inc., 133 NLRB 1132 (1961). In that case the employer had the practice of granting merit wage increases. The certified union, by letter, acquiesced in that practice for a period of eight months.[20] The union then rescinded its letter but the employer, nonetheless, continued its practice, refusing to make merit wage increases the subject of bargaining with the union. The union ultimately struck and a considerable number of employees

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[20] Not nine months as indicated by the Board in its decision. (R. 58, n. 12)

declined to honor the union's picket line. The employer filed a representation petition seeking an election and the union filed unfair labor practice charges. In disposing of this case, the Board stated (at p. 1132):

> "We find, as did the Trial Examiner, that the refusal to bargain concerning merit increases constitutes a violation of Section 8(a)(5) of the Act. We agree with the Trial Examiner that with the exception of Respondent's refusal to negotiate regarding merit increases the allegations of the consolidated complaint are without merit. As we are, therefore, finding that Respondent has lawfully questioned the Charging Union's majority status, we shall not issue the usual order, as recommended by the Trial Examiner, requiring the Employer to bargain with the Union upon request. We shall, instead, order the Respondent to bargain with respect to wages, rates of pay, hours and other conditions of employment, and specifically merit increases, when requested to do so by a majority representative of its employees.* * *" [21]

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[21] The Board, in its decision, erroneously set aside the Trial Examiner's reliance upon the Midwestern Instruments case. (R. 58, n. 12) The Board stated: "There was no showing that employees were aware of the union's withdrawal of consent, and, hence no basis for inferring that the union's authority and prestige as their collective bargaining representative were undermined by such merit increases as were thereafter granted." But, the Board must not have read that case carefully for in the Midwestern Instruments case, the Trial Examiner said: "I do not think that it can reasonably be inferred that such a refusal, assuming it was known to the employees, which created in impasse in the bargaining relations, contributed to any defection among union members. I do not think that a finding can be made per se that any unfair labor practice committed by an employer, however unrelated to the union membership and activity of the employees, inevitably contributed to loss of membership. Since an employer commits an unfair labor practice when he contracts with a minority union he should not be caught on both horns of the dilemma." (133 NLRB at 1143, emphasis supplied.) Since the Board affirmed the Trial Examiner's findings in this respect, its findings were based on the assumption that the unfair labor practice refusal to negotiate merit increases with the union was known to the employees. To have said that the employees were totally unaware of an employer's refusal to negotiate merit increases with the union or that the union's rescission of its consent to unilateral consideration of such increases would imply that the union either acted within a vacuum or without authority in rescinding its consent.

It is respectfully submitted that both of the foregoing cases are clearly in point and formulate a very persuasive precedent for the disposition of the case at bar. There is nothing shown in the case here at bar that the refusal to rescind the premium pay plan in any manner created an impasse or caused a termination in bargaining between the parties. The very fact that the parties had two meetings following the inauguration of the premium pay plan and otherwise administered and worked under their labor contract for many months thereafter fully rebuts any assumption that the premium pay unfair labor practice adversely affected the relationship of the parties or the relationship of the employees with their bargaining agent.

Certainly the unilateral granting of a series of merit increases, the employer having granted 94 in a 12 or 13 month period in the Midwestern Instruments case, would more readily come to the attention of employees and have aroused the open intervention of the union within its membership meetings and councils and would have a greater impact upon the bargaining relationship than would the single, isolated act of one of the two Employers involved in the case at bar in the establishment of the premium pay plan for a single group of employees (the glue spreader crews). It must be kept in mind at all times that the premium pay plan that C & C Plywood established at no time reduced or eliminated the agreed minimum rate for the jobs involved and there was absolutely no compulsion put upon any employee or any crew to meet the norms required to qualify for the premium pay. The simple payment of a premium over and above the contractual rate to reward employees for a special

fitness, skill, aptitude and the like is not apt to have an adverse impact upon the union's continued bargaining status.

But, the two cases cited by the Trial Examiner are not the only cases where the Board has chosen to permit the questioning of the continued bargaining status of a union in the face of an existing unfair labor practice or practices by the employer. This is developed further herein under the heading commencing near the bottom of this page.

D. The Rule of the Celanese Case satisfied in this Case at Bar.

By reason of the foregoing it is well established that a fair and reasonable application of the rules enunciated by the Board in the Celanese case results in the finding that (1) the Employers here had not only "some reasonable grounds for believing that the union had lost its majority status since its certification," which is all that is required by the Celanese case, but had substantial reasonable grounds for such a belief. And, (2) the issue of the Union's majority status was in no manner raised in a context of illegal anti-union activities. Nor had the Employers engaged in any conduct aimed at causing employee disaffection from the union or to gain time to undermine the union. Applying the very facts of the Celanese case to the case at bar, these Employers were entitled to refuse to bargain further with the Union and to legally question its continued majority status among their employees.

V. The Board's Rule Under Which It Refuses to Process Representation Petitions when Unfair Labor Practice Charges are Pending is Improper.

This phase of this discussion is an extension of the analysis of the Board's ruling that the premium pay unfair labor practice (both before and after the finding of its ultimate existence) constituted

a valid basis for it to bar the Employers from questioning the Union's majority status among their employees. This becomes important because the Board, arbitrarily and without hearing or really good reason, barred the Employers from obtaining an orderly and reasonable determination of the wishes of their employees as to whether or not the Union should continue as their bargaining agent. The Board ruled thusly purportedly because: First, there was an unproven unfair labor practice charge pending; Second, the unfair labor practice charge had been dismissed but the aggrieved had filed an appeal; and, Third, the unfair labor practice was ultimately established, sans any aura or manifestations of anti-union animus, absent any attempt to undermine the union, to cause disaffection for the union among the employees, or to gain time to undermine the union. The Employer questioned the Union bargaining status on August 28, 1963, but did not effectuate its refusal to deal further with the Union until after November 1, 1963.[22] Had the election been held, it was likely that the determination would have been known prior to November 1, 1963. Had the Union won, it would still have been the bargaining agent and the parties could have worked out their differences with

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[22] The Employers' letter to the Union raising the question of the Union's continued majority status set forth that the Employers would continue to recognize and deal with the Union as the bargaining agent of their employees through November 1, 1963 and that recognition would cease at that time. (Jt. Ex. 4) However, with the Board's refusal to process the Employers' petition, the recognition of the Union was continued and bargaining continued intermittently, but when requested by the Union, and grievances were processed with full recognition of the Union as bargaining agent until August, 1964 which is the likely reason that the Union's charge of unfair labor practices giving rise to this case at bar was not filed until November, 1964.

respect to the negotiation of their second labor agreement and the confusion and uncertainty that has reigned from November 1, 1963 to this date, over four years later would have been avoided. On the other hand, had the Union lost the election, while the Employers would have had no obligation to bargain with the Union until such time as it or another Union was recognized as bargaining agent, nothing would have prevented the Board, under its authority in Section 10(c) of the Act, to have ordered a resumption of recognition and bargaining if it was found that the unfair labor practice was so grievous that in order to effectuate the purposes of the Act such an order was necessary. The parties certainly would not have been in any worse relationship to each other or with respect to the employees than they are now as a consequence of the extended litigation involving this matter.

An examination of Section 10(c) of the Act makes it abundantly clear that the Board has the authority to "effectuate the policies of the Act" after it has found the existence of an unfair labor practice, not before it has made such a determination. While it is true that the Board is an administrative agency of government it exercises quasi-judicial functions and in that capacity it should not provide to those who come before it any lesser consideration than that given the most common criminal in our midst, i.e., that all are innocent until proven guilty.

The Act takes great pains to assure that the findings of the Board must be supported by "substantial evidence." (Sec. 10(e) The Board is admonished in the Act: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person

named in the complaint has engaged in or is engaging in such unfair labor practice, * * *" it shall act. (Sec. 10(c) All of this means nothing if the Board can, prior to the accused's day in court, deny him the orderly statutory processes and functions for which the Board is designed.

An analysis of the rule is found in Columbia Pictures Corp., 81 NLRB 1313, (1949), a case often cited by the Board and the Courts in reference to this rule. There the Board said (at pp. 1314-15):

> "It is true, as asserted by the Intervenor, that the Board does not, as a general practice, direct an election during the pendency of an unfair labor practice charge affecting the unit involved in the representation proceedings, absent the filing of waivers by the charging party. This practice is, however, a matter which lies within the discretion of the Board, as part of its function of determining whether an election will effectuate the policies of the Act, and is not required by the Act or by the Board's Rules and Regulations. Accordingly, an exception may be made to the general practice when, in certain situations, the Board is of the opinion that the direction of an immediate election will effectuate the policies of the Act.
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> "On the basis of the particular facts in this case, we are of the opinion that it will best effectuate the policies of the Act, and promote the orderly processes of collective bargaining, to direct an immediate election herein, despite the pendency of the unfair labor practice charges and the refusal of the Intervenor to file waivers with respect thereto. Accordingly, we shall direct an immediate election."

Attention is directed to the fact that nowhere within the authorities granted to the Board in the conduct of representation elections is an authority granted to the Board to "effectuate the policies of the Act," the keystone to its belief that it has authority to withhold such election procedures. The only place under the Act where the Board has the authority to take action to "effectuate the policies of the Act" is found in Section 10(c) of the Act and that is

after (not before) the Board has "upon the preponderance of the testimony taken" concluded that the person charged has engaged or is engaging in any such unfair labor practice.

Further reasoning establishing the arbitrary and capricious nature of this rule is found in the fact that it can be set aside by the one who files the unfair labor practice charge by his simply filing a waiver as the quoted portion of the Columbia Pictures Corp. case illustrates.[23] If the rule were sound, its exceptions would be few, if any, and certainly the waiver is not going to change the remedy of the Board if an unfair labor practice is untimately found.

As already noted, the exceptions to the foregoing rule are legion. The Columbia Pictures case also so illustrates for after stating the rule, the Board then decides it will not apply it "on the basis of the particular facts in this case." In American Metal Products Co., 139 NLRB 601 (1962) the rule was set aside because to have refused to hold the representation election would have disenfranchised permanently replaced economic strikers, individuals who had lost their jobs and whose future interest in the enterprise and in those who had crossed the picket lines was of a most tenuous nature. The rule was set aside in West-Gate Sun Harbor Co., 93 NLRB 830 (1951) because the unfair labor practice charge was filed

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[23] See also Carlson Furniture Industries, Inc., 157 NLRB 851 (1966); Schlachter Meat Co., Inc., 100 NLRB 1171 (1952). The Board, however, will customarily direct an election if the unfair labor practices are dismissed prior to the issuance of a complaint even though there is an appeal of that decision to the General Counsel, which further illustrates the nebulous application of this rule. Happ Manufacturing Co., 124 NLRB 202 (1959); California Spray-Chemical Corp., 123 NLRB 1224 (1959). The rule is not applied if an 8(e) unfair labor practice is charged. Holt Brothers, 146 NLRB 383 (1964)

too near the date of the scheduled representation election. If the rule is sound, it is sound irrespective of the date of the representation election. But the rule is not sound for it permits a party to file a "blocking" charge, a charge that blocks the Board's procedures automatically thus frustrating the very intent and purpose of the Act which is to solve not to hinder the solution of labor-management problems. Examples of this practice are also myriad. A union engages in a long, unsuccessful strike. The employees seek a decertification election or in consequence of employee behest, the employer files its petition. The union files its blocking charge and the Board, through its investigative processes searches into every activity of the employer to find some basis for supporting the charge. A complaint may be filed on a basis discovered by the Board's investigators unrelated to the charge filed by the party desiring to block the representation proceeding, and the wishes of the employees are soon forgotten in the melee that follows. Or the union may realize that it has lost its majority status and to gain time to reorganize the employees, it files the blocking charge.

True, these are matters which can be legislatively corrected but it is not necessary to await the slow and deliberate legislative processes for there is no legal basis for the Board's procedures in this regard at this time so that judicially the Board can be admonished to discontinue it. As noted, this is material to these proceedings because of the frustration and uncertainty that has been caused in this very matter because the Board declined to process either of the validly filed representation petitions.

The Courts have found the rule to be unsound. In N.L.R.B.

v. Minute Maid Corporation, 283 F.2d 705, 710 (C.A. 5, 1960) the Court said:

> "* * *The union cannot avoid the consequences of a loss of representation by the mere filing of an unfair labor practices charge against the employer. Nor is the Board relieved of its duty to consider and act upon application for decertification for the sole reason that an unproved charge of an unfair labor practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented. * * * The Board's wrongful refusal to act upon the decertification petition should not put Minute Maid in a position of refusing to bargain in good faith. The Board suggests that Minute Maid should have discussed with the Union the question of the Union's majority. This question is a fact question; it is a question which the Board is required to determine. It is not something to be bargained.* * *" (Emphasis supplied.)

Another Court, in a later decision, acted upon the assumption that the rule announced in the Minute Maid case disposed of the question and that the Board was compelled to process a representation or decertification petition, whether or not an unfair labor practice charge had been filed. N.L.R.B. v. Warrenburg Board and Paper Corporation, 340 F.2d 920, 924 n. 5 (1965).

The Board, in its brief, would have this Court believe that this rule is widely accepted and adhered to by this and other Courts.[24] But, the cases cited either simply allude to the fact that the Board has the rule or that the circumstances of the case are such that the employer's illegal acts were flagrant and the Court believed application of the rule to be proper under the Board's authority in connection with its disposition of unfair labor practice matters. Thus, in N.L.R.B. v. Trimfit of California, Inc., 211 F.2d 206 (1954)

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[24] Board's Brief at p. 18.

this Court observed that the employer acknowledged that it had discharged four employees because of their union activities. The employer there "pursued a course of conduct that evidences a clear violation of the Act's good faith requirements." (211 F.2d at 210) There this Court held that the employer's conduct clearly rendered a free election impossible. The factual situations of every one of the cases cited by the Board are completely distinguishable from the case at bar. In N.L.R.B. v. Auto Ventshade, Inc., 276 F.2d 303 (C.A. 5, 1960) the employer had totally and completely refused collective bargaining over a long period of time under circumstances in which it was found that it should have bargained. Flagrant unfair labor practices were present in Furrs, Inc. v. N.L.R.B., 350 F.2d 84 (C.A. 10, 1967), International Telephone and Telegraph Corp. v. N.L.R.B., 382 F.2d 366 (C.A. 3, 1967), and N.L.R.B. v. Miami Coca-Cola Bottling Co., 382 F.2d 921 (C.A. 5, 1967). The rule was simply recited or alluded to in N.L.R.B. v. Local 182, Teamsters Union, 314 F.2d 53 (C.A. 2, 1963) and Surorenant Manufacturing Co. v. Alpert, 318 F.2d 396 (C.A. 1, 1963). In none of these cases did the Court examine the rule to determine its validity under the Act. Simply to acknowledge the existence of the rule does not approve it, particularly where reference to it is largely dictum.

The lack of depth and substance to this rule is further evidenced by comparison with the impact that should be given to the specific unfair labor practice found to exist. The Courts have held that the commission of an unfair labor practice, as such, simply does not bar an employer's doubt of the union's majority status. Nor, has it been held that the commission of an unfair labor practice, per se,

compels recognition of the union as bargaining agent. Thus, the Court in N.L.R.B. v. S. S. Logan Packing Co., 386 F.2d 562, 570 (C.A. 4, 1967) said:[25]

> "In those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive and of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had, the Board may have the power to impose a bargaining order as an appropriate remedy for those unfair labor practices. * * * The remedy is an extraordinary one, however, and, in light of the guaranty of Section 7 of employees' rights not to be represented, its use, if ever appropriate, must be reserved for extraordinary cases."

While the foregoing case involved the judicial rejection of a Board order directing recognition of a union under circumstances where the union did not hold bargaining rights, its principle is equally applicable to the case at bar. There the employer was found to have engaged in unfair labor practices by conducting coercive interrogation and surveillance. The Court held that those unfair labor practices could be remedied without barring the unfettered use of the statutory scheme for the conduct of a representation election to determine the true wishes of the employees in the security of anonymity. Nor is this principle without Board support. In a recent case the Board found that a series of what it regarded as "widespread and flagrant unfair labor practices" on the part of an employer nevertheless did not warrant a bargaining order. J. P. Stevens & Co., Inc. 167 NLRB No. 37 (Aug. 31, 1967).

The Court in N.L.R.B. v. Flomatic Corp., 347 F.2d 74

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[25] This case was recently cited with approval by this Court in Don the Beachcomber v. N.L.R.B., ---F.2d---, 67 LRRM 2551, 2552 (Feb. 7, 1968)

(C.A. 2, 1965) analyzed a large number of cases in which the Board and the Courts reviewed the imposition of a bargaining mandate as the penalty for the commission of unfair labor practices and concluded that such a remedy "should be applied with restraint." (347 F.2d at 79) The Court noted (at p. 78):

> "A bargaining order, however, is strong medicine. While it is designed to deprive employers of a 'chance to profit from a stubborn refusal to abide by the law,' * * * and although it undoubtedly operates to deter employers from adopting illegally instrusive election tactics, its potentially adverse effect on the employees' Section 7 rights must not be overlooked. * * * That section protects the right of employees to join or refrain from joining labor organizations. And that right is implemented by Section 9(c)(1) which provides for representation elections by secret ballot. Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undernine the freedom of choice that Congress wanted to guarantee to employees, and thus frustrate rather than effectuate the policies of the Act.
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> "The facts of this case provide an illustration. The Board's disagreement with its own Trial Examiner on the purport and effect of Rice's letter certainly compels the conclusion that we are not presented with a flagrant violation of the Act. There was no aggressive or planned campaign aimed at dissipating union strength by resort to threats, discharges or refusals of recognition. * * *"

In the face of this precedent, the Board order in the case at bar takes on a cloak of unreasonable administrative fiat. It also illustrates the totally indefensible nature of the rule barring a determination of a union's continued majority status in the face of any unfair labor practice for the remedy to be applied in light of a judicially determined unfair labor practice is the only statutory basis for the Board's denial of its bargaining representative determining processes.

VI. The General Counsel did not sustain the Burden of Proof that Employers engaged in Unfair Labor Practices. Board's Finding of an Unfair Labor Practice is not supported by Substantial Evidence nor a Preponderance of the Testimony.

It is fundamental that the General Counsel has the burden of proving that an employer has engaged in conduct which constitutes an unfair labor practice.[26] The rule is well stated by this Court in the Sebastopol Apple Growers case, supra, n. 26, in which this Court said:

> "* * *The burden was on the General Counsel to establish the unlawfulness of respondent's actions, not upon the respondent to establish its actions were lawful." * * * (269 F.2d at 712)
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> "The Trial Examiner might have operated the cannery differently. But the respondent had the right to determine for itself how its business was to be conducted. Management may make wise decisions or stupid ones, and it is of no concern of the Board unless they are unlawfully motivated.* * *" (269 F.2d at 712-13)

In N.L.R.B. v. Winter Garden Citrus Products, 260 F.2d 913, 916 (C.A. 5, 1958) the rule was stated thusly:

> "It is not and never has been the law that the Board may recover upon failure of the Respondent to make proof. The burden is on the Board throughout to prove its allegations, and this burden never shifts. It is, of course, true that if the Board offers sufficient evidence to support a finding against it, a respondent, as stated in the quotation first above, stands in danger of having such a finding made unless he refutes the evidence which supports it. But it is wholly incorrect to say or suggest that the burden of showing compliance with the act ever shifts to the respondent. The burden of showing no compliance is always on the Board.* * *"

In this same connection, the rule is also clear that findings of the Board must be supported by substantial evidence in the record considered as a whole. Thus, the United States Supreme Court

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[26] N.L.R.B. v. Sebastopol Apple Growers Union, 269 F.2d 705 (C.A. 9, 1959); N.L.R.B. v. McGahey, 233 F.2d 406 (C.A. 5, 1956); N.L.R.B. v. Kaiser Aluminum & Chemical Corp., 217 F.2d 366 (C.A. 9, 1954).

stated in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951):

> "* * *Congress has merely made it clear that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Earlier on the same page, the Court noted:

> "* * *The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. * * *"

The obligation of the General Counsel here was first to establish that the Union did in fact represent a majority of employees at the time the Employers questioned that majority. As the Board itself has stated in Stoner Rubber Co., 123 NLRB 1440 (1959):

> "It is elementary that in a refusal to bargain case the General Counsel has the burden of proving the union's majority. In the present case, the General Counsel introduced no evidence of majority status except the certification issued to the Union on May 24, 1956, approximately 14 months before the alleged refusal to bargain. Generally a certification is absolute proof of majority for one year following its date of issuance. After the lapse of the certification year, the certification creates only a presumption of continued majority. This presumption is rebuttable. Proof of majority is peculiarly within the special competence of the union. * * *An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continuing majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal to bargain date the union in fact did represent a majority of employees in the appropriate unit."

The Employers here came forth with "sufficient evidence to cast

serious doubt on the union's continued majority status." The General Counsel, however, made no effort, beyond the effect to be placed on the certification, which was at least 14 months old when recognition and bargaining was first sought to be terminated, to establish the existence of a union majority. He thus failed in carrying the burden of proof in this element of the case.

The foregoing is further confirmed by the Court in N. L. R. B. v. Electric Furnace Co., 327 F. 2d 373, 376 (C.A. 6, 1964) wherein it stated:

> "If an employer has well-founded doubts about a union's majority status, and no unfair labor practice on the part of the employer has caused this loss of majority, the employer may, at the end of the Union's certification year, refuse to bargain further with the union. * * * (Citing cases.)" (Emphasis supplied.)

The burden is upon the General Counsel to show that the unfair labor practice involved did cause the loss of majority status, if it did. In this case he neither proved it nor tried to prove it.

In addition, separately, the General Counsel had the burden of proving, by substantial evidence, that the Employers failed and refused to bargain collectively with the Union in contravention of Sections 8(a)(1) and (5) of the Act. This he has not done. There is no substantial evidence in this matter to support the Trial Examiner's finding that the Employers did not have a reasonable basis upon which to form a good faith doubt of the Union's continued majority status among the employees. Moreover, there is a total absence of substantial evidence to support the Board's finding that the premium pay unfair labor practice is in any way connected with the Union's loss of majority status. The most that can be said either for the General Counsel's case or the Board's decision is that it is based on the

suspicion or the assumption that there was a causal connection between the premium pay unfair labor practice and the loss of majority status by the Union, but it was not even partially proven. It could not be proven because it did not exist.

In N.L.R.B. v. Houston Chronicle Publishing Co., 211 F.2d 848, 854-5 (C.A. 5, 1954) the Court stated the applicable rule as follows:

> "* * *When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion, this is not such a case."

Or, as this Court stated in N.L.R.B. v. Citizen-News Co., 134 F. 2d 970, 974 (1943):

> "* * *Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding."

Examining the evidence upon which the General Counsel relied and upon which the Board relied we find its precariously narrow base to consist of the premium pay unfair labor practice finding; nothing more, nothing less. Yet, the mere existence of an unfair labor practice has not barred the Board or the Courts on many prior occasions from permitting the determination or redetermination of the bargaining status of a labor union or from finding no illegality in the later cessation of recognition by an

employer.[27] And in those cases the existence of the unfair labor practice could be considered far more grievous or flagrant than the truly technical unfair labor practice found with respect to the premium pay unfair labor practice. Thus, the effect of the unfair labor practice, based on fact not on speculation, together with the circumstances that surround it becomes the key to whether or not it should bar the legitimate questioning of the majority status of the Union involved. As a consequence, when the totality of the evidence here is considered, it is readily apparent that the General Counsel has not sustained the burden of proof incumbent upon him and there is not substantial evidence in the record, considered as a whole, to support the Board's unfair labor practice finding.

VII. Miscellaneous Considerations.

There are also other considerations incidental to the consideration of the issue presented in this matter worthy of this Court's evaluation.

The rules of the Board strictly limit the issues that may be raised before the Board when appealing from the Decision of a Trial Examiner. While the Trial Examiner's Decision is generally written in the form of a recommendation, it becomes final if no exceptions are taken to it. An examination of these rules and the Statements of Procedure of the Board, leaves but one conclusion, namely that an issue not raised by one of the parties in its exceptions to the

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[27] N.L.R.B. v. S. S. Logan Packing Co., supra; N.L.R.B. v. Marcus Trucking Co., 286 F.2d 583 (C.A. 2, 1961); N.L.R.B. v. Superior Fireproof Door & Sash Co., supra; N.L.R.B. v. Minute Maid Corp., supra; N.L.R.B. v. Dan River Mills, Inc., supra; N.L.R.B. v. Adhesive Products Corp., 281 F.2d 89 (C.A. 2, 1960); Midwestern Instruments, Inc., supra; Mission Manufacturing Co., supra.

Board will be considered closed.[28] An examination of this case, however, shows that no one questioned the Trial Examiner's rationale or conclusion with respect to his finding that the Employers did not raise the question of the Union's continuing majority status among the employees in a context of illegality. The Board, however, unilaterally, without notice or issue before it, reversed the Trial Examiner on that issue and that issue alone. Certainly if a party to the case, such as the Employers here, had known that that finding would be made the basis for reversing the Trial Examiner, or in fact would have been considered at all, that party would have made it a point to present matter to the Board with respect to it.

The only issue in this case presented to the Board was the issue of whether or not the Trial Examiner's finding that the Employers did not have adequate objective evidence to form a good faith doubt of the Union's continuing majority was valid or not. Yet the Board actually never passed on that issue but chose to ignore it. No notice was given to anyone that it would even consider the issue

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[28] See Rules and Regulations, N.L.R.B., Series 8, Sec. 102.46(h), 29 CFR 102.46(h): "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding." See also Statements of Procedure, N.L.R.B., Series 8, Sec. 101.12(b) and (c), 29 CFR 101.12(b) and (c): "(b) If no exceptions are filed to the trial examiner's decision, and the respondent does not comply with its recommendations, his decision and recommendations automatically become the decision and order of the Board, pursuant to section 10(c) of the act, and become its findings, conclusions, and order. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes. (c) If no exceptions are filed to the trial examiner's decision and its recommendations and the respondent complies therewith, the case is normally closed but the Board may, if it deems it necessary in order to effectuate the policies of the act, adopt the decision and recommendations of the trial examiner."

prior to receipt of its decision. In the face of this conduct, the Board now publicly asks that a more conclusive status be given to Trial Examiner's Decisions.[29] Such an appeal is empty when the Board itself chooses to disregard the finality of the Trial Examiner's Decision with respect to an issue from which no exceptions are taken.

The Act guarantees to the employer a right to a representation election, subject to the rules of the Board. Those rules are clearly to be such as are necessary for the orderly processing and holding of elections. The Employers here fully complied with the published and known rules of the Board with respect to their request for an election.

Nothing in the legislative history of the Act indicates that it was contemplated by Congress that the Board should have total freedom to reject a petition otherwise properly founded.

The fact that Veneers, Inc., a separate entity, and its employees were not a party, directly or indirectly to the premium pay unfair labor practice proceedings is also a material factor to this case. The Board seeks to pass this off on the basis that the same individual is General Manager of both firms and that both firms were deemed jointly to be the employer of the appropriate bargaining unit determined by the Board. Yet, the decision made by this General Manager with respect to the premium pay matter was made solely in his capacity as General Manager of C & C Plywood and not as General Manager of Veneers, Inc. The premium pay case in no manner named or referred to Veneers, Inc. as a party. The Board

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[29] From the text of a speech by Chairman of the Board, Frank W. McCulloch on February 15, 1968 at the Federal Bar Association and the George Washington University National Law Center Labor Relations Institute in Washington, D. C. (67 LRR 183)

in its efforts here completely neglects to consider the rights or the equities of Veneers, Inc. and its employees. The isolated act of C & C Plywood in the premium pay matter pales to insignificance when the entire matter is viewed in perspective. In spite of this, the Board seeks to extend the effects of that act upon Veneers, Inc. and its employees. The two companies objected strenuously to being made joint employers or a single employer for the convenience of the Board and the Union in the initial instance. (Tr. 26, Jt. Ex. 2) The fact that the Employers chose in the circumstances not to seek a review of the Regional Director's determination in no manner made that decision so conclusive that questions concerning it could not be raised later. Amalgamated Clothing Workers v. N.L.R.B., 365 F.2d 898, 904 (C.A.D.C. 1966)

With respect to footnote 11 on page 12 of the Board's Brief, attention is directed to the fact that the number of employees in the bargaining unit had risen to 201 on September 3, 1963 so that the figure given for July 26, 1962 by the Board permits the possibility of a distortion in the understanding of this matter. (Tr. 29)

There had been no case law to substantiate the Board's theory, that reliance upon an interpretation of a contract, made in good faith, nevertheless permits the Board to interpret the contract in determining whether or not an unfair labor practice exists before the decision in the prior premium pay unfair labor practice case. Such a new rule, or new law, should not be given an impact sufficient to completely frustrate the wishes of the employees and the relationship of the Employers with their employees. Since it has now become law that the Board is free to pass upon an other-

wise valid, good faith interpretation placed on specific labor contract language, the Board must expect that there will be changing relationships and attitudes between the time that the difference of opinion arises over the contractual interpretation and the ultimate effectuation of the remedy. Under such circumstances, the Board cannot expect to freeze the bargaining relationship without consideration of the ever changing wishes of the employees.[30] Differences normally arise over the manner in which given contractual language should be interpreted. When these differences arise in good faith and without the addition of other factors demonstrating that the interpretation is spurious, not in good faith and otherwise in a posture of anti-union animus, unfair labor practices will result which in fact have little, if any, effect upon the disaffection of employees from the union. Thus, in these cases, the Board must not hastily thrust the bargaining remedy upon the parties for it can, as in this case, do more to frustrate the policies of the Act, than to effectuate them.

VIII. The Remedy.

It is respectfully submitted that the Board's decision finding an unfair labor practice in the matter before this Court cannot be upheld in the face of the Board's own precedent and the application of the appropriate law. Thus, the Complaint in this matter should be ordered dismissed and the Petition for Enforcement denied.

Additionally, however, there is the matter of the Board's Order in the prior premium pay unfair labor practice case which

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[30] In his speech referred to in n. 29 Chairman McCulloch said: "The law does not make the choice of employees irrevocable; it permits them at appropriate times to abandon collective bargaining or to change their bargaining agent."

should also be recognized in these proceedings for it compels bargaining with the Union here involved by indirection. Such bargaining now, in the face of the Union's loss of majority status, would actually frustrate rather than enhance the policies and purposes of the Act. That Order provides that the Employer, C & C Plywood, "will not fail to refuse to bargain collectively" with the Union "by unilaterally instituting a premium pay plan for glue spreader crews," etc. (Case No. 19,769 before this Court, 351 F.2d 224, decree entered August 31, 1967 in response to the mandate of the Supreme Court.)

As noted by the Court in N.L.R.B. v. Flomatic Corp., 347 F.2d 74, 77 (1965):

> "* * *However, the Board's action is not insulated from judicial review where it has applied 'a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.' N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953); see also, Local 60, United Bhd. of Carpenters v. N.L.R.B., 365 U.S. 651 (1961); Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938)."

It has been determined that C & C Plywood engaged in an unfair labor practice in its unilateral announcement of the premium pay plan. However, the fact that it did so under its good faith belief that it was permitted to do so within the rights reserved to it under its labor contract and the fact that there has been absolutely no finding of any anti-union animus, hostility, effort to undermine the union or cause disaffection from the Union are all important mitigating circumstances which, at least, place the unfair labor practice found in the category of a "technical" unfair labor practice. This distinction was judicially recognized in N.L.R.B. v. Citizens Hotel Co., 326 F.2d 501, 505 (C.A. 5, 1964):

> "There was, therefore, an impermissible unilateral change constituting a failure to bargain.* * * (Citing cases.) But this refusal to bargain must here be characterized as a 'technical' one in the since that although the action violates the law because of its consequences, it was not an instance of deliberate, purposeful refusal to engage in negotiations having the genuine aim of bringing about an agreement. We put emphasis on this because the actual nature of the failure to bargain bears significantly on the remedy to be imposed by the Board."

Since all of the parties to the earlier case are also before this Court in this case, and that case is a material factor to the case at bar, in an effort to avoid circuity of litigation, in the circumstances of this case, since the loss of the Union's majority status was not contributed to by the earlier unfair labor practice, it is urged that this Court direct the Board to revise its Order in the premium pay case. It is suggested that the policies of the Act will be effectuated to simply require that C & C Plywood, in any future bargaining relationship with any certified labor union, not refuse to bargain collectively with such labor union with respect to the institution of any premium pay plan for any of its glue spreader crews upon request. Of course, the paragraph dealing with this subject in the Notice to Employees should also be amended accordingly, assuming it is believed necessary that such a Notice be posted to effectuate the policies of the Act. The references to not interfering with, restraining or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act, while of questionable necessity, could remain without revision. There is adequate precedent. The Courts have judicially reviewed the Board's Orders and Remedies and have chosen to modify them. N.L.R.B. v. Flomatic Corp., supra.; N.L.R.B. v. Logan Packing Co., supra.; Philip Carey Manufacturing Co. v.

N.L.R.B., supra.; and many others. Additionally, the Board itself has issued orders compelling an employer found to have engaged in a violation of Section 8(a)(5) to perform certain acts upon the advent or readvent of a bargaining representative while not compelling bargaining with that union at the time. Midwestern Instruments, Inc., supra.

CONCLUSION

Based upon the foregoing, the Respondent Employers respectfully submit that the Board has erroneously adjudged an unfair labor practice to have been committed by the refusal of these Employers to recognize and bargain further with the Union after they had adequate reason to question the continued majority status of the Union.

It is respectfully urged that the Petition for Enforcement be denied and that the decree of this Court direct a modification of the order of the Board in the prior premium pay unfair labor practice case so as not to subvert the will and desires of the employees with respect to their choice of bargaining representative, if any.

Respectfully submitted,

George J. Tichy
Attorney for Respondents

March 15, 1968

APPENDIX

In addition to the provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) set forth in Appendix A of the Board's Brief, the Respondent believes that the following provisions of that Act are also relevant:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

* * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

* * *

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.[31]

George J. Tichy
Attorney for Respondents

[31] In preparing this Brief, the first offset printed brief by this counsel to this Court, the Clerk's Office was consulted with respect to whether or not quoted material and footnotes mandatorily would be double spaced. It was determined that practice before this Court appears to except from the rule that all typed matter shall be double spaced both footnotes and quoted material. This also appears to be the practice in other Courts. Thus this brief was prepared accordingly.